Because I Said So: A Chance to Rethink *Chevron* Deference
by the Honorable Eric L. Lipman

My eleven year-old is an independent thinker. He assumes nothing. He takes nothing for granted: "Why must I go to bed?" "Why do I need to wear a hat?" "Why is there gravity?" "Why can't I juggle steak knives?" Why? Why? Why?

Sometimes these interrogatories can be trying. Recently, at the end of one very long day of questions and answers, I just broke. Tumbling toward the refuge of exhausted parents everywhere, I blurted out: "Why? Because I said so…. That's why!!!"

I recalled that day, and that feeling of exasperation, as I read through the U.S. Supreme Court's recent decision in *City of Arlington v. Federal Communications Commission*. I remembered that: Just because I can say something authoritatively, does not mean that my authority is the best answer to a question.

The *City of Arlington* case involved a challenge to the Federal Communications Commission's powers to set timeframes within which local zoning authorities must act on requests to build wireless facilities. The City of Arlington, Texas challenged the FCC's regulation by asserting that the agency exceeded its authority under the Communications Act. The question as to which the U.S. Supreme Court granted *certiorari* was whether an agency's interpretation of its statutory authority (and the limits of that authority) is entitled to deference from the courts under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Stated another way, does Congress's grant of rulemaking authority to an agency also include an implied delegation to presumptively mark the limits of that authority?

Apparently, it does. Writing for the Court, Justice Scalia explained: *Chevron* deference on statutory interpretation "is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Thus, if "the agency's answer is based on a permissible construction of the statute, that is the end of the matter."

The Court instructs that Congress impliedly asks federal agencies to mark the limits of their own powers, in part, because this chore should be kept away from federal judges. Justice Scalia continues:

> Some judges would be deceived by the specious, but scary-sounding, "jurisdictional" - "nonjurisdictional" line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an

> ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.

To my mind, both the analysis and the conclusion are problematic. First, the evidence that Congress intends agencies to take unclear drafting as far as the words will go, is pretty scant. I suspect that if this proposition was placed into a Congressional Resolution, it would not be approved by either house of Congress.

Second, from a separation-of-powers perspective, Congress loses nearly nothing by "impliedly delegating" to federal agencies the power to determine their own jurisdiction. If Congress ever became displeased with an agency's determination, Congress could revoke the delegation. Those who are diminished by the "implied delegations" are the federal courts — and by extension, the politically powerless who turn to the courts for relief. We shouldn't lightly assume that Congress intends to diminish the role of another branch. And, the courts shouldn't offer up this idea themselves.

Lastly, and perhaps most worrisome, the courts' retreat in this area appears to be willful. Consider this exchange from the oral argument in *City of Arlington*:

> JUSTICE KENNEDY: Let me ask you this: Suppose there is a provision of this statute which is very difficult to understand. Does that bear on the Chevron Step Zero analysis on the question of what you call jurisdiction?
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> MR. GOLDSTEIN: It does, Justice Kennedy.
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> JUSTICE KENNEDY: All right. I was looking at this statute and I say, you know: How do I know when this agency has failed to act? I don't — that's just a very obscure data point.

Do federal courts defer to agency assessments of their own authority because the task of sorting through the underlying statute is difficult? I hope not.

That is as bad as me telling my eleven year-old that his bedtime is 9:00 p.m. because, well, I said so. In both instances, there is a much better answer. We just need to commit to working it through.

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